PHILLIP L. HEINTZ

IBLA 89-132 Decided May 2, 1989

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, declaring placer mining claims null and void ab initio. WMC 232776 and WMC 232777.

Affirmed.

1. Mining Claims: Lands Subject to--Mining Claims: Powersite Lands--Withdrawals and Reservations: Effect of--Withdrawals and Reservations: Powersites

Lands which are covered by a preliminary permit issued by the Federal Energy Regulatory Commission for a proposed power project are not open to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. | 621(a) (1982), unless the land has been restored to entry under sec. 24 of the Federal Power Act, as amended, 16 U.S.C. | 818 (1982). Where a mining claim is located at a time when the lands are closed to entry under sec. 2(a) of the Mining Claims Rights Restoration Act, BLM properly declares the claim null and void ab initio.

APPEARANCES: Phillip L. Heintz, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Phillip L. Heintz appeals from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated November 3, 1988, declaring the Lucky Cat Nos. 1 and 2 placer mining claims, WMC 232776 and WMC 232777, null and void ab initio because the claims are situated on lands unavailable for mineral entry.

Both mining claims were located on January 6, 1987. The Lucky Cat No. 1 is situated in the SW^ sec. 18, T. 56 N., R. 90 W., sixth principal meridian, Wyoming. The Lucky Cat No. 2 is located in the NW^ sec. 18, T. 56 N., R. 90 W., sixth principal meridian, Wyoming. 1/ In its decision

1/ In his notices of location, appellant listed the 165th meridian rather than the 6th principal meridian.

BLM explained that the claims are located within WYW 102109 Federal Energy Regulatory Commission (FERC) Power Project, dated April 4, 1986. BLM refers to a copy of the Master Title Plat which depicts the lands in issue as segregated from mining location for W 102109 FERC Power Project P-09338 dated April 4, 1986. Citing the regulation at 43 CFR 2320.0-3(a), BLM stated that the lands are segregated from "entry, location, or other disposal" under the laws of the United States, until otherwise directed by FERC or by Congress.

In his statement of reasons, appellant asserts that prior to filing his claim in January 1987 he checked the records in the Sheridan, Wyoming, courthouse in November 1986 for any prior claims. Appellant states that no claims, either by an individual or a governmental agency, were recorded. Appellant also avers he telephoned BLM in Cheyenne, Wyoming, in December 1986 and was told that no prior claims were on file and that he could file his claims. Appellant questions why it has taken almost 2 years for BLM to declare his claims null and void.

Appellant states that FERC did not file any document in the Sheridan, Wyoming, courthouse that would show this land was closed to mineral entry because it was within a power project area. Appellant asserts that there was no compliance with 43 CFR Subpart 2320 in that no public notice of intent to withdraw the land is on file in the Sheridan County courthouse. Appellant adds that the area in dispute does not lend itself to power development because there is no nearby source of water. Also, according to appellant, his claims are located approximately 6 miles from the possible energy development area.

Appellant refers to the Mining Claims Rights Restoration Act of 1955 (MCRRA), 30 U.S.C. | 621(a) (1982), which opened land in powersites to mineral entry with certain exceptions. Appellant contends that there are signs on the property, including a log cabin, mine tailing, and Long Tom Flume, which show that this land was previously opened for development. Appellant contends that since this land was previously opened to entry, it cannot now be withdrawn for any reason.

Section 2(a) of the Mining Claims Rights Restoration Act, 30 U.S.C. | 621(a) (1982), provides in part:

> All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims * * *: Provided, That all power rights to such lands shall be retained by the United States: * * * And provided further, That nothing contained herein shall be construed to open for the purposes described in this section any lands (1) which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other Act of Congress, or (2) which are under examination and survey by a prospective licensee of the Federal Energy Regulatory Commission, if such prospective licensee holds an uncanceled preliminary

> permit issued under the Federal Power Act authorizing him to conduct such examination and survey with respect to such lands and such permit has not been renewed in the case of such prospective licensee more than once. [Emphasis in original.]

Information obtained from FERC shows that on July 9, 1985, the Little Horn Water Group, Sheridan, Wyoming, submitted an application to FERC for a preliminary permit for the Little Big Horn Pumped Storage Power Project pursuant to section 4(f) of the Federal Power Act, 16 U.S.C. | 797(f) (1982). The purpose of the project is to provide water for industrial use at the terminal reservoir, Parkman Reservoir, as well as to provide pumped generation for electric utility purposes. By order dated February 26, 1986, FERC issued a preliminary permit to the Little Horn Water Group for the proposed water power project. The order stated that this permit is issued for a period effective February 1, 1986, and ending either 36 months from the effective date or on the date that a development application submitted by the permittee has been approved. Therefore, the lands in question were not open to mineral entry under section 2(a) of MCRRA, 30 U.S.C. | 621(a) (1982), because they were under consideration and survey by a prospective licensee of FERC which held an uncanceled preliminary permit issued under the Federal Power Act, supra.

[1] A map accompanying the FERC documents shows that the lands on which appellant's claim were located were included in power project No. 9338. BLM's plat shows that the lands in question were segregated from surface and mining location as of April 4, 1986. Lands which are covered by a preliminary permit issued by FERC for a proposed power project are not open to mineral entry under section 2(a) of MCRRA unless the land has been restored to entry in accordance with section 24 of the Federal Power Act, as amended, 16 U.S.C. | 818 (1982). See Robert A. Pettigrew, 54 IBLA 257 (1981); see also Leslie Corriea, 93 IBLA 346 (1986); Lairy D. Brookshire, 56 IBLA 73 (1981); Harold M. Voris, 48 IBLA 206 (1980); Sam Rosetti, 15 IBLA 288, 81 I.D. 251 (1974). Where a mining claim is located at a time when the lands are closed to entry under section 2(a) of MCRRA, BLM properly declares the claim null and void ab initio.

Appellant contends that the requirements of 43 CFR Subpart 2320 were not met in that no public notice of intent to withdraw the land is on file in the Sheridan County Courthouse. The foregoing regulations do not impose any such requirement. We note, however, that in its order issuing the preliminary permit, FERC states that the notice of application for the power project was published in accordance with section 4(f) of the Act and FERC's regulations.

Appellant objects to the fact that BLM delayed 2 years before notifying appellant that his claims were null and void. BLM is under no affirmative duty to mineral locators to promptly check the legal status of every claim. Paul Vaillant, 90 IBLA 249 (1986); Hugh B. Fate, Jr., 86 IBLA 215 (1985); Mac A. Stevens, 84 IBLA 124 (1984).

Appellant asserts that prior to filing his claims he telephoned BLM regarding the status of the land and was informed by BLM that he could

file a claim on the land in issue. It appears that appellant is raising an estoppel defense to BLM's decision to declare the claims null and void, i.e., he has relied to his detriment on BLM's alleged erroneous information. Reliance upon erroneous information or advice provided by Federal employees cannot create rights not authorized by law. David D. Beal, 90 IBLA 91 (1985); Silver Buckle Mines, Inc., 84 IBLA 306 (1985). Also, this Board has held in prior cases that estoppel will not lie where the erroneous advice upon which reliance is predicated was not "in the form of a crucial misstatement in an official decision." United States v. Morris, 19 IBLA 350, 377, 82 I.D. 146, 159 (1975), quoting from Marathon Oil Co., 16 IBLA 298, 316, 81 I.D. 447, 455 (1974). See also Cyprus Western Coal Co., 103 IBLA 278 (1988); Steve E. Cate, 97 IBLA 27, 32 (1987). Here appellant does not refer to a misstatement in an official decision, but to an oral conversation with an unidentified BLM employee. Finally, we have noted that while estoppel may lie where reliance on Government statements deprived an individual of a right which he would have acquired, estoppel does not lie where the effect of such action would be to grant an individual a right not authorized by law. 43 CFR 1810.3(c); Raymond T. Duncan, 96 IBLA 352 (1987). In light of the foregoing, we hold estoppel cannot be invoked in this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Wm. Philip Horton
Chief Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge